



# What Everybody Knows and What Too Few Accept

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## WHAT EVERYBODY KNOWS AND WHAT TOO FEW ACCEPT

*Lawrence Lessig\**

Don Blankenship directed \$3 million of his personal funds to the end of electing Brent Benjamin to the Supreme Court of Appeals of West Virginia.<sup>1</sup> His apparent aim was to influence the result in an appeal of a case that would cost his company \$50 million.<sup>2</sup> His apparent aim, then, was to use money to bring about a particular judicial result.

In a sense, there is nothing at all unusual about Blankenship's behavior. Some spend more than \$3 million to bring about a particular judicial result — think about the money Microsoft spent defending itself against antitrust charges, estimated to be over \$13 million.<sup>3</sup> Some spend less than \$3 million to bring about a particular judicial result — think about the two Pennsylvania juvenile detention centers found to have bribed Juvenile Court Judges Mark A. Ciavarella and Michael T. Conahan by paying them more than \$2.6 million to steer juvenile detainees to the centers.<sup>4</sup> In these two cases, the spending behavior is perfectly unambiguous from both a legal and a moral perspective. Microsoft's behavior (spending \$13 million on lawyers) is unambiguously legal and ethical. The juvenile detention centers' behavior (spending \$2.6 million to bribe two judges) is unambiguously illegal and unethical.

Blankenship's behavior, by contrast, is more ambiguous. While there is nothing illegal or even unethical about his spending \$3 million to persuade voters to elect Benjamin to the state Supreme Court of Appeals — indeed, the behavior is constitutionally protected<sup>5</sup> — when

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<sup>1</sup> Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2257 (2009).

<sup>2</sup> See *id.*

<sup>3</sup> See James V. Grimaldi, *Microsoft Trial — Probe Has Cost Government \$13.3 Million*, SEATTLE TIMES, Oct. 6, 1999, at A1, available at <http://community.seattletimes.nwsources.com/archive/?date=19991006&slug=2987296> (concluding Microsoft spent more than the government did).

<sup>4</sup> John Sullivan, *Court Act May Clear Hundreds of Youths*, PHILA. INQUIRER, Mar. 27, 2009, at A1.

<sup>5</sup> See, e.g., Buckley v. Valeo, 424 U.S. 1, 14 (1976) (“[Campaign] contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities.”). The Court explained these First Amendment freedoms by noting that:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of

Justice Benjamin refused to recuse himself from Blankenship's case, this whole sequence of free (or \$3 million) speech was cast into a very different light. The contribution drew into doubt the practical independence of the West Virginia Supreme Court of Appeals from those who would use this particular kind of speech to influence it.<sup>6</sup>

"Practical independence": obviously, Justice Benjamin was formally independent of Blankenship. Blankenship didn't hire him. He had no power to fire him. Benjamin received his salary from the state. Nothing Blankenship could do would change the size of that salary, or the speed with which it grew. In a strictly formal sense, Benjamin was an independent judge whose decision in this matter could not be controlled by the litigant Blankenship.

But no one who is genuinely concerned about independence — or maybe better, improper dependence — would limit considerations to formal independence alone.<sup>7</sup> A concern about improper dependence is also a concern about informal or effective dependence.<sup>8</sup> When civil rights activists in the South charged that judges were not independent, for example, no one thought the concern was that the KKK had the right to fire federal judges. The concern instead was that a system of informal, extragovernmental influence would make it impossible for

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the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

*Id.* at 19 (footnote omitted).

<sup>6</sup> See *Caperton*, 129 S. Ct. at 2258.

<sup>7</sup> See REBECCA BILL CHAVEZ, *THE RULE OF LAW IN NASCENT DEMOCRACIES* 23–24 (2004) ("Many scholars mistakenly limit their analysis [of Latin American courts] to formal guarantees of judicial autonomy. Actual practices may illustrate that the formal institutions are mere façades that hide subordination of the courts." (footnote omitted)); Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts* (pt. 1), 46 AM. J. COMP. L. 287, 318 (1998) ("Separation of powers at the level of the trial court achieves formal independence for judges. In reality, however, the influence of the tribal council and chairman upon judges varies from one tribe to another, and from one historical period to another. . . . The extent to which . . . tribal politicians can influence judges depends in part upon formal laws for removing judges, and in part upon informal traditions and personalities."); cf. Renée Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195, 197 (2000) ("Much has been made of the independence of juries in America's early history. But it is not so well understood that this formal independence coexisted with a large amount of informal influence by the judge on the jury.").

<sup>8</sup> See, e.g., CHAVEZ, *supra* note 7, at 23 ("In order to determine the degree of judicial autonomy in a given country, a consideration of informal practices must accompany the analysis of the formal rules outlined in national constitutions."); Sida Liu, *Beyond Global Convergence: Conflicts of Legitimacy in a Chinese Lower Court*, 31 LAW & SOC. INQUIRY 75, 91–94 (2006) (examining the influence of administrative hierarchy on the Chinese judiciary and arguing that informal influences over judicial decisionmaking undermine due process in Chinese courts far more than do formal, institutional factors).



judges to decide cases “on the merits.”<sup>9</sup> A system of influence, that is, that could undermine the integrity of the bench.

And so too here. No one believes that every campaign contribution would tend to corrupt the judicial process. If campaigns were cheap, if contributions were small, if contributors were many or unknown — in any of those cases, the fact that money was contributed to a judge’s campaign could not lead anyone reasonably to believe that the contribution would effect any particular result. In these cases, money would be benign, and the raising of money in these cases should not undermine trust in the institution of the judiciary, at least for any reasonable soul.

But to suggest that a reasonable soul should discount the effect of money in cases like Blankenship’s is to invite an exercise of, as Professor Charles Black put it, “the sovereign prerogative[] of philosophers — that of laughter.”<sup>10</sup> For all of us recognize the pattern from which this case emerges — a pattern spreading across state judiciaries,<sup>11</sup> and completely infecting federal and state legislative elections<sup>12</sup> — and more of us are recognizing the fear this pattern invites.

The pattern is the increasing dependence of public officials upon private money to secure tenure.<sup>13</sup> The fear is the corruption such dependency breeds. Not “corruption” in the traditional sense of a quid pro quo designed to feather a judge’s or politician’s own nest. No one is talking about bribery, or its close cousins. Rather, “corruption” in a less direct, more systems-based sense: that because these public officials depend upon private wealth to secure their tenure, they will be-

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<sup>9</sup> See Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions About the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817, 819–22 (1998).

<sup>10</sup> Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960).

<sup>11</sup> As one report put it, “Between 1999 and 2007, candidates for America’s highest courts have raised over \$165 million, a remarkable jump from the \$62 million raised between 1993 and 1998.” JUSTICE AT STAKE CAMPAIGN, *THE NEW POLITICS OF JUDICIAL ELECTIONS IN THE GREAT LAKES STATES, 2000–2008*, at 3 (Jesse Rutledge ed., 2008).

<sup>12</sup> The three public funding states — Arizona, Maine, and Connecticut — are the exception. See BRENNAN CTR. FOR JUSTICE ET AL., *BREAKING FREE WITH FAIR ELECTIONS: A NEW DECLARATION OF INDEPENDENCE FOR CONGRESS 1* (2007); Kenneth R. Mayer & Timothy Werner, *Electoral Transitions in Connecticut: The Implementation of Clean Elections in 2008*, at 1 (Aug. 29, 2007) (unpublished manuscript, on file with the Harvard Law School Library).

<sup>13</sup> See Jonathan S. Krasno & Frank J. Sorauf, Report, *Evaluating the Bipartisan Campaign Reform Act (BCRA)*, 28 N.Y.U. REV. L. & SOC. CHANGE 121, 167–68 (2003) (discussing the escalating costs of campaigns for federal office and the financial obstacles faced by potential candidates); Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 642 (2009) (concluding from empirical studies that “[t]he cost of supreme court campaigns . . . has risen so dramatically that it is often difficult, if not impossible, for candidates to win elections without substantial funding”).

come responsive to the concerns of that private wealth, so as to assure its continued supply.<sup>14</sup> Such responsiveness would be fine in a system designed to produce it. But neither a judiciary nor a legislature is meant to be responsive in this way.<sup>15</sup> The effect may be unintended. But the consequence is a weakening of the integrity of the system.<sup>16</sup>

Or so any reasonable soul could believe. In the California district in which I lived, 88% of Democratic voters believed money buys results in Congress.<sup>17</sup> Over 40% of congressional candidates devote more than 25% of the time on their campaign schedules to raising money to return either themselves or their party to power.<sup>18</sup> Members of the elected state judiciary are on a similar path.<sup>19</sup> None could deny that for Congress, the burden of fundraising has an effect on either access to members or the policies they support.<sup>20</sup> None could help won-

<sup>14</sup> See Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 563–64 (1999) (“A tiny number of very wealthy individuals have enormous influence over the financing of election campaigns, and, ultimately, on the elections themselves. Large campaign donations and candidates’ dependence on those donations for the funds necessary to fuel their campaigns provide major donors with opportunities for special access to elected officials.”); Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1126–27 (1994) (“Our elected representatives are so indebted to the special-interest donors on whom they depend for their political existence that they are losing their ability to provide their best judgment in representing the citizens who elected them.”).

<sup>15</sup> Professor Richard Briffault has remarked upon the tension between private campaign donations and constitutional norms:

Less than one-tenth of 1% of the population provides 36% of all individual donations to candidates. Nor is this group demographically or politically representative of the rest of the electorate. Private funding gives the affluent a disproportionate role in election campaigns and is, thus, in tension with the norm of one person, one vote.

Richard Briffault, *Reforming Campaign Finance Reform*, 91 CAL. L. REV. 643, 645–46 (2003) (footnotes omitted) (reviewing BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS* (2002)); see Wertheimer & Manes, *supra* note 14, at 1126–27 (arguing that private donations to election campaigns have produced results contrary to our concept of a representative democracy).

<sup>16</sup> See Timothy A. Canova, *Campaign Finance, Iron Triangles and the Decline of American Political Discourse*, 12 NEXUS 57, 65–66 (2007) (“Th[e] flood of money that continues to pour into election campaigns should raise concerns about the integrity of our governing institutions and public policies. Instead of liberal pluralism, we have . . . captured governments and iron triangles that serve narrow private interests while excluding the unorganized and general public from the processes of policymaking.”); Shepherd, *supra* note 13, at 639 (“If . . . judicial elections profoundly and pervasively influence how judges decide cases, then judicial impartiality is lost.”).

<sup>17</sup> Polling by Global Strategy Group conducted March 4–5, 2008 (on file with the Harvard Law School Library).

<sup>18</sup> See CAMPAIGN ASSESSMENT & CANDIDATE OUTREACH PROJECT, *CANDIDATES DEVOTE SUBSTANTIAL TIME AND EFFORT TO FUNDRAISING* (2000), <http://www.bsos.umd.edu/gvpt/herrnson/reporttime.html>.

<sup>19</sup> Cf. Chris W. Bonneau, *Patterns of Campaign Spending and Electoral Competition in State Supreme Court Elections*, 25 JUST. SYS. J. 21, 24–26 (2004) (showing from empirical data that, between 1990 and 2000, campaign spending in state supreme court elections increased significantly).

<sup>20</sup> See, e.g., MARTIN SCHRAM, *SPEAKING FREELY: FORMER MEMBERS OF CONGRESS TALK ABOUT MONEY IN POLITICS* 62 (1995) (“People who contribute get the ear of the member



der whether, as the cost of judicial elections rises as well, a parallel effect will spread to state judiciaries. The consequence in both contexts is to draw the integrity of the institution into doubt.<sup>21</sup> In the context of Congress, cynicism breeds disengagement — why waste your time trying to persuade an institution controlled by money (unless, of course, you too have money)?<sup>22</sup> Critics of Justice Benjamin could rightly fear that if the same attitude about the state judiciary became dominant, a critical asset of the judiciary would be lost — if it has not already been lost.<sup>23</sup>

It is useful to reflect upon the character of this asset, and its importance, at least in the context of the federal courts. Think about the Supreme Court. I come from the professional class charged with the task of being critical about decisions of the Supreme Court. And no doubt, for any given decision, there are any number of ways that one might be critical. But notice that no one — at least no one credible — would ever suggest that the Court decided the way it did because of the influence of money. Maybe politics intruded where it shouldn't

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and the ear of the staff. They have the access — and access is it. Access is power. Access is clout. That's how this thing works . . .” (quoting former Congressman Romano Mazzoli)).

<sup>21</sup> See Briffault, *supra* note 14, at 579–83 (discussing the detrimental effects of private campaign funding on voter perceptions and the legitimacy of government action); see also *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208 (1982) (noting “the importance of preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption”).

<sup>22</sup> Professor Richard Hall has written:

Among Washington activists, the prospects for effective campaign finance reform have often cycled between cautious optimism and deep disillusionment. The general public has been more steadfastly cynical, their democratic sensibilities deadened by the ever more remarkable sums of money raised and spent by private interests on public campaigns with each new election. Surely, all that money must be buying elections, bribing legislators, or biasing legislation in some way — purchases that “special interests” but not rank and file voters can afford. Viewed in this light, the hallowed democratic principle of “one person, one vote” loses its normative luster.

Richard L. Hall, *Equalizing Expenditures in Congressional Campaigns: A Proposal*, 6 ELECTION L.J. 145, 145 (2007) (footnote omitted); see also Wertheimer & Manes, *supra* note 14, at 1127 (“The pervasive dependence of elected officials on special-interest money is central to the crisis in public confidence that faces our government today. The public’s belief that its interests are not being served in Washington is a direct reflection of the way in which monied interests and the pursuit of political-influence money by elected officials have become dominant forces in our political life.”).

<sup>23</sup> One national survey concluded that more than 75% of U.S. citizens believe that “campaign contributions influence judicial decisions.” James Sample, Editorial, *Justice for Sale*, WALL ST. J., Mar. 22, 2008, at A24 (citing Greenberg Quinlan Rosner Research, Inc. & Am. Viewpoint, *Justice at Stake Frequency Questionnaire 4* (2001)). A study by the National Center for State Courts found that 78% of respondents strongly or somewhat agreed with the statement that “elected judges are influenced by having to raise campaign funds.” NAT’L CTR. FOR STATE COURTS, *HOW THE PUBLIC VIEWS THE STATE COURTS* 42 (1999). These beliefs are not unfounded: one recent empirical study of campaign contributions and elected state supreme courts concluded that “there is a strong relationship between campaign contributions and judges’ voting.” Shepherd, *supra* note 13, at 669.

have.<sup>24</sup> Maybe the perspective of class was too invisible for the Justices to check.<sup>25</sup> Maybe the details were too obscure for the Justices adequately to focus upon.<sup>26</sup> But whatever reason we might have for criticizing what the Justices did, none of us would say it had anything to do with “money.”

Contrast Congress: there is not a decision that Congress makes today that is not criticized first as being influenced by campaign contributions.<sup>27</sup> And once that criticism is lodged, there are few in the citizen class who have the patience to listen to anything more. The presumption is what the criticism confirms; counterevidence is not even considered. Whatever else one might think about Congress or the Court, this presumption is one crucially important difference between them. We presume the integrity of the (federal) judicial branch. We presume the corruption (in this limited but important sense) of the legislative branch. The difference is enormously important to the health and power of each: trust in the judicial branch has been steady and strong; trust in the legislative branch has been falling and weak.<sup>28</sup>

Thus, in my view, critics of Justice Benjamin had an overwhelming argument: his behavior was improper. The question was not, as he seemed to frame it,<sup>29</sup> whether he was actually biased. The question instead was whether it would be reasonable for others to believe —

<sup>24</sup> See, e.g., Frank B. Cross, *What Do Judges Want?*, 87 TEX. L. REV. 183, 202 (2008) (reviewing RICHARD A. POSNER, *HOW JUDGES THINK* (2008)) (“Empirical evidence of apparently political decision making at the Supreme Court level is extensive.”); Ran Hirschl, *Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend*, 15 CAN. J.L. & JURIS. 191, 217 (2002) (“Constitutional scholars, legal practitioners, and political activists critical of the U.S. Supreme Court’s crucial role in determining the outcome of the 2000 presidential election, regard the *Bush v. Gore* saga as the most glaring example of the judicialization of politics in the United States.”).

<sup>25</sup> For an example of one such characterization of the Court, see John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69 (2008), noting that “[w]hen socioeconomic elites favored laissez-faire, the Supreme Court ruled in favor of economic liberties, and now when elites favor sexual autonomy, the Court rules in favor of rights to abortion and same-sex conduct,” *id.* at 107 (footnote omitted).

<sup>26</sup> For a discussion of the general difficulties faced by courts in addressing complex, “polycentric” problems, see Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–404 (1978). For an example of a critique of generalizations in Supreme Court jurisprudence, see Ezra Rosser, *Ambiguity and the Academic: The Dangerous Attraction of Pan-Indian Legal Analysis*, 119 HARV. L. REV. F. 141 (2006), <http://www.harvardlawreview.org/forum/issues/119/deco5/rosser.pdf>, which argues that the Supreme Court improperly ignores distinctions between tribes in its Indian law cases.

<sup>27</sup> See, e.g., Anne C. Mulkern, *Utility PACs Generous to Key Lawmakers in Climate Debate*, N.Y. TIMES ON WEB, July 27, 2009, <http://www.nytimes.com/gwire/2009/07/27/greenwire-utility-pacs-generous-to-key-lawmakers-in-clim-54282.html> (quoting commentators critical of utility firms’ campaign contributions and their impact on recent energy legislation); Editorial, *Devices for Lawyers*, WALL ST. J., Aug. 13, 2008, at A16 (criticizing Congress for being beholden to contributions from plaintiffs’ lawyers).

<sup>28</sup> See Jeffrey M. Jones, *Trust in Government Remains Low*, GALLUP, Sept. 18, 2008, <http://www.gallup.com/poll/110458/trust-government-remains-low.aspx>.

<sup>29</sup> *Caperton*, 129 S. Ct. at 2262–63.



whether true or not — that his behavior would be compromised by the dependency created by significant campaign contributions.

Of course it would. Ours is a culture primed to draw precisely this link.<sup>30</sup> It is a link the public has already drawn with the Framers' first branch — to Congress's great loss. And if experienced regularly, it is a link that would weaken the institution of the judiciary. That fact is reason enough to require that Justice Benjamin step aside.

This conclusion is both tied to money, and independent of it. Some of the Justices wondered why they should be concerned about the influence of money, but not about other kinds of influences. As Justice Scalia asked during oral argument: "I was appointed to the bench by Ronald Reagan. . . . [S]hould I have been any less grateful to Ronald Reagan than . . . the judge here was grateful to the person who spent a lot of money in his election?"<sup>31</sup>

But money is different. Other influences are either arguably relevant to the job of a judge or arguably helpful to the judge in her work. The affinity Justice Scalia might feel for the policies (as distinct from the man) of President Reagan, for example, is arguably part of the design of presidentially selected Justices.<sup>32</sup> Not necessarily, and not necessarily anything to praise, but arguably. And that contestation weakens any general opinion that the influence is corrupting.<sup>33</sup>

There is, by contrast, no theory that makes money even arguably relevant to the legal determinations of a court. It could be. There could be cultures where money-based aristocratic notions are strong enough to translate wealth into automatic entitlement even from a court.<sup>34</sup> But that is not the ideal of our legal culture. The judiciary is

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<sup>30</sup> See, e.g., Press Release, Harris Poll, Very Large Majorities of Americans Believe Big Companies, PACs, Political Lobbyists and the News Media Have Too Much Power and Influence in D.C. (Mar. 12, 2009), available at [http://www.harrisinteractive.com/harris\\_poll/pubs/Harris\\_Poll\\_2009\\_03\\_12.pdf](http://www.harrisinteractive.com/harris_poll/pubs/Harris_Poll_2009_03_12.pdf).

<sup>31</sup> Transcript of Oral Argument at 11, *Caperton*, 129 S. Ct. 2252 (2009) (No. 08-22), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/08-22.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/08-22.pdf).

<sup>32</sup> See Lori A. Ringhand, *"I'm Sorry, I Can't Answer That": Positive Scholarship and the Supreme Court Confirmation Process*, 10 U. PA. J. CONST. L. 331, 356-59 (2008) (questioning the view that it is the Justices' duty to interpret the Constitution the way "they — not the President who nominated them, the Senate that confirmed them, or the public to whom those actors answer — think best," *id.* at 357).

<sup>33</sup> See Bruce Fein, Commentary, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672, 672 (1989) ("Judge Bork's nomination [to the Supreme Court] was irreproachable. . . . [T]he mere fact that Judge Bork's judicial philosophy coincided with certain objectives sought by [conservative constituencies] does not prove that he was selected to please them. It is equally plausible that President Reagan wanted to leave as part of his legacy an exceptionally talented jurist who shared his view of the proper judicial role.").

<sup>34</sup> Indeed, such deference has developed for those of an analogous status: heads of state. See Jerrold L. Mallory, Note, *Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV. 169, 179-81 (1986).



to be that one sphere where we are insulated from the relevance of money to the decision drawn.

Yet while the involvement of money made the influence in this case special, meriting attention to it over other plausibly more effective influences, the duty of Justice Benjamin to act to avoid harming the institution that he serves was not triggered here simply because of the money. The merits of a particular appeal notwithstanding, a judge should not act in a way that weakens the institutional respect for the court upon which she sits — whether or not that weakening is tied to money.

Think, for example, about the joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>35</sup> As is plain from that opinion, at least one of the three Justices writing the joint opinion believed that *Roe v. Wade*<sup>36</sup> had been wrongly decided.<sup>37</sup> But the problem with reversing *Roe*, at least for the authors of the joint opinion, was how the Court would be perceived if the public saw it flipping the results of a significant constitutional rule because of a concerted effort by the President to appoint Justices to reverse it. As the joint opinion put it:

[T]he Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973. To overrule prior law for no other reason than that would run counter to the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.<sup>38</sup>

The Court quoted *Mitchell v. W.T. Grant Co.*<sup>39</sup> for this proposition:

A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve . . . .<sup>40</sup>

If a concern about the appearance of improper influence is enough to lead a Justice to continue a constitutional rule that he or she believes was originally a mistake, it certainly should be enough to lead

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<sup>35</sup> 505 U.S. 833 (1992).

<sup>36</sup> 410 U.S. 113 (1973).

<sup>37</sup> See *Casey*, 505 U.S. at 871 (joint opinion of O'Connor, Kennedy, and Souter, JJ.) ("We do not need to say whether each of us, had we been Members of the Court when the valuation of the state interest [in protecting the potentiality of human life] came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions."); *id.* at 869 (majority opinion) ("A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of . . . profound and unnecessary damage to the Court's legitimacy . . . ." (emphasis added)).

<sup>38</sup> *Id.* at 864.

<sup>39</sup> 416 U.S. 600 (1974).

<sup>40</sup> *Casey*, 505 U.S. at 864 (quoting *Mitchell*, 416 U.S. at 636 (Stewart, J., dissenting)).

Justice Benjamin to leave the fate of Blankenship's appeal to the other, less invested justices.

Thus again, whether Justice Benjamin should have recused himself is in my view a straightforward question: he should have. By not stepping down, he strengthened the suggestion that money buys results not just in the political branches, but also in the judicial branch. He had a duty not to impose this cost upon the West Virginia courts.

But the question the Supreme Court had to address in *Caperton v. A.T. Massey Coal Co.*<sup>41</sup> was not whether Justice Benjamin behaved badly. It was whether the Due Process Clause required that he behave differently.<sup>42</sup> More precisely, it was whether due process requires a standard that would force judges "like" Benjamin off cases "like" *Caperton* (with all the vagueness those comparisons invite).<sup>43</sup> Or more precisely still, it was whether the Supreme Court should evolve its recusal jurisprudence to police more vigorously conflicts between judges and their benefactor-litigants, in light of the obviously salient changed circumstance of the spreading cancer of expensive judicial elections.<sup>44</sup>

In my view, it should not have. *Caperton* was a mistake. The Supreme Court was wrong to expand the reach of due process to remedy the bad judgment of this state supreme court justice because, paradoxically, its opinion too will likely, and unnecessarily, weaken respect for the judiciary.

I do not believe the Court was wrong because I believe due process is a historically limited concept.<sup>45</sup> History, of course, should root the doctrine, but fidelity to meaning requires a constant translation to assure that original meaning remains true in changing contexts.<sup>46</sup>

Nor do I disagree with Justice Kennedy's sensitive and insightful argument about just why the influence at issue in *Caperton* is analogous to influence for which the Court had previously required recusal.<sup>47</sup> Justice Kennedy was right that the influence complained of

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<sup>41</sup> 129 S. Ct. 2252 (2009).

<sup>42</sup> See *id.* at 2256.

<sup>43</sup> See *id.* at 2265 ("Our decision today addresses an extraordinary situation where the Constitution requires recusal. . . . The facts now before us are extreme by any measure. The parties point to no other instance involving judicial campaign contributions that presents a potential for bias comparable to the circumstances in this case.").

<sup>44</sup> See *id.* at 2259 (noting that the emergence of "new problems" led the Court to identify circumstances requiring recusal in addition to the common law rule); see also JAMES SAMPLE, DAVID POZEN & MICHAEL YOUNG, BRENNAN CTR. FOR JUSTICE, FAIR COURTS: SETTING RECUSAL STANDARDS 10-12 (2008), available at [http://www.brennancenter.org/content/resource/fair\\_courts\\_setting\\_recusal\\_standards](http://www.brennancenter.org/content/resource/fair_courts_setting_recusal_standards).

<sup>45</sup> Cf., e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (plurality opinion).

<sup>46</sup> See Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 130.

<sup>47</sup> See *Caperton*, 129 S. Ct. at 2252, 2262-65.



in *Caperton* was of the same sort as that policed in *Tumey v. Ohio*<sup>48</sup> — clearly the kind that “would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.”<sup>49</sup>

But the fidelity demanded of the Supreme Court goes beyond simple fidelity to meaning. In my view, it includes as well a fidelity to role.<sup>50</sup> In other words, the question for the Court is never just “what is a faithful reading of the constitutional or statutory text?”; it must also be whether that reading could tend to weaken the institution of the Court. Not weaken the institution because the reading is controversial — the Court should not shy away from the right answer merely because the right answer may not be popular.<sup>51</sup> Rather, does the reading weaken the institution by unnecessarily forcing it to behave in a way that cannot help but render it less “judicial” — either because the Court must make judgments that cannot help but appear political, or because the rule it seeks to implement is predictably unadministrable? If the reading would tend to weaken the institution in this way, then in my view — confirmed, I suggest, by the practice of the Court from its beginning<sup>52</sup> — fidelity to role might well demand that that meaning take second place. Put differently, the Court pursues fidelity to meaning subject to fidelity to role.

Again, it is just this kind of “fidelity to role” that would justify (if anything does) the joint opinion’s refusal in *Casey* to overturn *Roe*. There was no doubt that the opinion in *Casey* would be controver-

<sup>48</sup> 273 U.S. 510 (1927).

<sup>49</sup> *Caperton*, 129 S. Ct. at 2260 (quoting *Tumey*, 273 U.S. at 532).

<sup>50</sup> This framing was suggested to me by Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig’s Theory of Translation*, 65 *FORDHAM L. REV.* 1435 (1997).

<sup>51</sup> Cf. Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 *LAW & SOC’Y REV.* 621, 622–23 (1991) (citing studies showing broad public acceptance of unpopular Supreme Court decisions because the public perceives the Court as institutionally fair). But cf. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction’s Political Court*, 91 *GEO. L.J.* 1 (2002) (detailing the unpopularity of the Supreme Court during Reconstruction, which led to congressional threats of repeal).

<sup>52</sup> See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 355–57 (1819) (observing that Congress, not the judiciary, must weigh congressional enactments to determine whether they are “necessary” under the Necessary and Proper Clause); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 131 (1810) (holding that the judiciary cannot interfere with the legislative process); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165–70 (1803) (describing the “political question” doctrine); THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS* 11–15 (1992) (detailing the Marshall Court’s deference to the executive in foreign affairs); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 *ARIZ. ST. L.J.* 113, 187 (2002) (detailing the Marshall Court’s deference to the executive in relations with Native Americans); see also *Vieth v. Jubelirer*, 541 U.S. 267, 277–78 (2004) (plurality opinion) (collecting cases holding an issue nonjusticiable); *Baker v. Carr*, 369 U.S. 186, 215 n.43 (1962) (suggesting limits to “political question” deference).

sial.<sup>53</sup> But the controversy the joint opinion was anxious to avoid was of a particular kind: controversy that would cast a political light on the Supreme Court,<sup>54</sup> thereby weakening the appearance of independence from the President and systematically encouraging presidents to leverage unpopular decisions into political support.

A similar calculation should have guided the Court in *Caperton*, though no doubt the calculus required to ensure the Court abides by fidelity to role is complicated in practice. Indeed, the arguably faithful interpretation of the Due Process Clause that Justice Kennedy advanced was plainly designed to protect the institution of the judiciary from the corrupting influences of money.<sup>55</sup> Its purpose at least was thus both to advance fidelity to meaning and fidelity to role. And if good intentions were the measure of success, there would be little anyone could say to criticize the opinion of the Court. The opinion expressed a sincere hope that it might provide a bulwark against this institution-weakening behavior by judges like Justice Benjamin by extending, reasonably, a due process-based protection for the basic judicial process.

But hope is not a prediction. And any honest prediction of the effect of the *Caperton* rule must reckon both the risks the rule will create, and the necessity for those risks. To assess the new rule, one must ask: what are the risks the *Caperton* rule will create for the judiciary (even while trying to protect the judiciary)? Was there any real need to create these risks?

The risks of harm were clearly marked by the main and amicus briefs to the Court; they were dramatically remarked by the Chief Justice in his extraordinary dissent.<sup>56</sup> There is an inevitable vagueness to the line the majority opinion tried to draw. That vagueness will be costly because of the regular incentives parties will have to test the line whenever money has been part of a judicial election. A vigorous de-

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<sup>53</sup> See, e.g., Linda Greenhouse, *Both Sides in Abortion Argument Look Past Court to Political Battle*, N.Y. TIMES, Apr. 20, 1992, at A1.

<sup>54</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992) ("Whether or not a new social consensus is developing on [the abortion] issue, its divisiveness is no less today than in 1973, and pressure to overrule the decision, like pressure to retain it, has grown only more intense. A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original decision, and we do so today.")

<sup>55</sup> See *Caperton*, 129 S. Ct. at 2259-60 (discussing *Turney*'s conclusion that the Due Process Clause incorporates a concern about judges' pecuniary interests).

<sup>56</sup> See *id.* at 2269-72 (Roberts, C.J., dissenting) (enumerating forty concerns and potentially unadministrable situations that the *Caperton* rule creates). While I believe the Chief Justice exaggerated some of the uncertainty in his charge against the Court's opinion, I do agree with his conclusion. His perspective is less focused than mine on the relationship between the result and a vision of judicial role.



fense, or successful prosecution, will need to press all the follow-on questions that this first move presents. Courts without the freedom of a discretionary docket will be forced to resolve those follow-on questions. A public without the discipline necessary to understand the full context of such claims will be increasingly exposed to charges of improper influence.<sup>57</sup> How often and to what effect are empirical questions that can be answered only over time. But the risk is plain enough, and should have been plainly recognized by every Justice on the Court.<sup>58</sup>

No doubt, sometimes such risks are worth taking. Where the value is important, where the demands of justice are strong, and where there is no other plausible institution that might address or remedy the problem at issue: in those cases of course the Court should act consistent with fidelity to meaning, despite the costs to the judicial institution.

But these three conditions do not obtain in this case. Granted, the value of independence is important.<sup>59</sup> For victims whose harm is being remedied, the demand of justice is strong as well. But unlike rules that limit the power of police, or the President, there are plenty of other institutions with both the means and the motive to prevent Justice Benjamin-like problems going forward.<sup>60</sup> These other institu-

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<sup>57</sup> Cf. *id.* at 2272 (“Every one of the ‘Caperton motions’ or appeals or § 1983 actions will claim that the judge is biased, or probably biased, bringing the judge and the judicial system into disrepute.”).

<sup>58</sup> The strongest argument in favor of the rule in *Caperton* parallels the argument in favor of Justice Souter’s refusal to weigh industry-funded research in *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008). In that case, the Court drew attention to research that had been funded by Exxon, only to signal that it was “declin[ing] to rely on it.” *Id.* at 2626 n.17. The consequence of such a rule is to reduce the expected return from such research, possibly reducing the likelihood that it will be produced. Likewise with the *Caperton* rule: the mere probability that a judge would be forced to recuse himself because of significant campaign contributions would obviously significantly reduce the value of large contributions. That in turn may reduce the number of such contributions, and lessen any pressure on the rule since fewer possible claims would be presented.

<sup>59</sup> The four dissenting Justices, no less than the majority, acknowledged the importance of judicial independence. See *Caperton*, 129 S. Ct. at 2267 (Roberts, C.J., dissenting) (“I, of course, share the majority’s sincere concerns about the need to maintain a fair, independent, and impartial judiciary — and one that appears to be such.”). The disagreement between the Justices was rather over whether judicial independence could best be preserved by hard-to-define standards backed up by the Constitution’s Due Process Clause. In the dissenters’ view, this approach was sure to lead to an increase in allegations of judicial bias and, in the end, to do “far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case.” *Id.*

<sup>60</sup> The discipline of federal and state judges is typically a matter for investigatory commissions and often involves elaborate procedures. For example, anyone who believes a federal judge “has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts” may file a complaint. 28 U.S.C. § 351 (2006). The chief judge of the relevant circuit then reviews the complaint. *Id.* § 352. Unless the chief judge finds the complaint to be without merit or no longer relevant, he or she must appoint a special committee of judges to investigate the matter further. *Id.* §§ 352(b), 353. A dissatisfied complainant or judge may petition the judicial council of the circuit to review an unfavorable final order issued by the chief judge. *Id.*



tions should have given the Court reason enough to avoid stepping into the complicated question of balancing influence against judicial integrity in this case. And likewise, the Court's decision to enter the field of these questions could well weaken the work of these other institutions.<sup>61</sup>

The judiciary is a uniquely self-policing institution.<sup>62</sup> Through rules that ratify the judgment of lawyers and other judges, the system develops norms that set out the range of permissible judicial behavior.<sup>63</sup> For noncriminal behavior at least, these norms are powerful regulatory tools, as being well thought of is one of the few perquisites of an insanely underpaid job (the judge),<sup>64</sup> and the clearest way to re-

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§ 352(c). The special committee must conduct an investigation and then file a report with the judicial council, which may investigate the allegations further, dismiss the complaint, discipline the judge, or refer the matter to the Judicial Conference of the United States, which may consider more severe measures, such as recommending impeachment to the House of Representatives. *Id.* §§ 354–355. These proceedings are governed by detailed rules promulgated by the Judicial Conference. See generally JUDICIAL CONFERENCE OF THE U.S., RULES FOR JUDICIAL CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS (2008), available at [http://www.uscourts.gov/library/judicialmisconduct/jud\\_conduct\\_and\\_disability\\_308\\_app\\_B\\_rev.pdf](http://www.uscourts.gov/library/judicialmisconduct/jud_conduct_and_disability_308_app_B_rev.pdf).

<sup>61</sup> For a careful account of the ways in which legal intervention may undermine autonomous, community-based remedies, see ERIC A. POSNER, LAW AND SOCIAL NORMS 219–22 (2000). While Professor Posner's focus is on communities outside of the law, one might suspect his conclusions would carry over to communities (like bar associations) within the law. In any case, one cannot assume, as the Court did, see *Caperton*, 129 S. Ct. at 2266–67, that adding a constitutional layer to judicial ethics will not affect the work of legal communities. If Posner is correct, it could well weaken it.

<sup>62</sup> It was two colleagues — district judges sitting within the same circuit — who filed the complaint that ultimately led to the removal of Judge Alcee Hastings from the bench. See *In re Complaints of Judicial Misconduct*, 9 F.3d 1562, 1564 (U.S. Jud. Conf. 1993) (citing *In re Certain Complaints Under Investigation by an Investigating Comm. of the Judicial Council of the Eleventh Circuit*, 783 F.2d 1488, 1492 (11th Cir. 1986)). Federal law further encourages the judiciary to police its own by granting circuit court chief judges the authority to commence disciplinary investigations on their own initiative even though no one has filed a written complaint. 28 U.S.C. § 351(b). In one extraordinary example of self-policing, Chief Judge Alex Kozinski of the Ninth Circuit identified a complaint of judicial misconduct against himself and requested further investigation. See *In re Complaint of Judicial Misconduct*, No. 08-90035 (9th Cir. filed June 16, 2008), available at [http://www.c9.uscourts.gov/misconduct/orders/08\\_90035.pdf](http://www.c9.uscourts.gov/misconduct/orders/08_90035.pdf).

<sup>63</sup> Most prominently, the American Bar Association Center for Professional Responsibility has developed and maintained the Model Code of Judicial Conduct and Model Rules for Judicial Disciplinary Enforcement. See Am. Bar Ass'n Ctr. for Prof'l Responsibility, Judicial Ethics and Regulation, <http://www.abanet.org/cpr/judicial/home.html> (last visited Oct. 3, 2009). These models have had a tremendous influence on state norms for judicial behavior. See, e.g., Howland W. Abramson & Gary Lee, *The ABA Model Code Revisions and Judicial Campaign Speech: Constitutional and Practical Implications*, 20 Touro L. Rev. 729, 731 (2004) (“[N]early all of the states have adopted some version of the ABA Model Code of Judicial Conduct.”).

<sup>64</sup> Professor Frederick Schauer has suggested that a desire for popularity might play a rather large role in judicial decisionmaking:

It is widely recognized that reputation or esteem provides a powerful money-independent incentive for many people. Perhaps the Justices of the Supreme Court, like the rest of us, care about their reputation, care about the esteem in which they are held by certain reference groups, and care enough such that, at the margin or even far from



main well thought of is to remain on the right side of judicial norms. Those norms in turn are defined in part by bar associations and other judges, none of whom have any reason to favor undue influence by campaign contributors. Indeed, as the amicus brief of a number of states argued quite effectively, “[T]he States are not asleep at the wheel. To the contrary, the States are presently experimenting with different — and often novel — ways of ensuring the impartiality of their own judges.”<sup>65</sup>

The states can experiment here without that experiment drawing the independence of the judiciary into doubt. One state can have a rule different from another, and that diversity alone would not draw either into question.<sup>66</sup> But the Court is not similarly free to experiment. If the structure of the *Caperton* rule proves poor, it will be costly for the Court to replace it with a different rule, differently structured. Moreover, even if it could experiment, the Court would not have the institutional capacity to evaluate the results of any experiment. Bar associations and judicial conferences, by contrast, can craft better rules in light of commissioned studies<sup>67</sup> or familiar experience. They can evolve those rules as the character of judicial elections in a particular state evolves, as well.

Thus, had the Supreme Court done nothing in this case, save writing a scolding opinion about the poor judgment of Justice Benjamin,<sup>68</sup>

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the margin, they seek to conform their behavior to the demands of the relevant esteem-granting (or -withholding) or reputation-creating (or -damaging) groups.

Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 629 (2000) (footnote omitted). My point here is simply that reputational concerns offer a significant reason for judges to behave ethically. To the extent that reputational concerns do so, they perform a valuable systemic function.

<sup>65</sup> Brief of the States of Alabama et al. as Amici Curiae Supporting Respondents at 17, *Caperton*, 129 S. Ct. 2252 (2009) (No. 08-22), available at [http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-22\\_RespondentAmCu7States.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/08-22_RespondentAmCu7States.pdf).

<sup>66</sup> The Court acknowledged states’ “vital” interest in developing and enforcing their own rules governing judicial behavior, *Caperton*, 129 S. Ct. at 2266, but reserved for itself the right to intervene at any time if it deems the state not to have preserved sufficient levels of judicial integrity. *Id.* at 2266–67.

<sup>67</sup> One recent example would be the Breyer Committee Report, which was the result of an investigation undertaken in response to requests by Chief Justices Rehnquist and Roberts after members of Congress alleged that judicial ethical standards were being inadequately enforced. See JUDICIAL CONDUCT AND DISABILITY ACT STUDY COMM., IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980: A REPORT TO THE CHIEF JUSTICE 1 (2006), available at <http://www.supremecourtus.gov/publicinfo/breyercommitteereport.pdf>.

<sup>68</sup> The Court, however, showed no interest in rebuking Justice Benjamin for his poor judgment. To the contrary, the majority seemed only to commend Justice Benjamin for his “careful” response to the recusal motions, *Caperton*, 129 S. Ct. at 2262 (emphasis added), “probing search into his actual motives and inclinations,” *id.* at 2263 (emphasis added), and “extensive search for actual bias,” *id.* at 2265 (emphasis added). This commendation is especially remarkable given that such introspection is not an adequate discharge of a judge’s duties under any applicable standard for recusal. See *id.* at 2265 (“Due process ‘may sometimes bar trial by judges who have

citizens would have been left with the work of these extralegal institutions, each with a strong incentive to evolve the norms necessary to assure that the Justice Benjamins of the future are the exception, not the rule. And given the nature of these institutions, they could have developed these norms without the collateral strategic costs of the *Caperton* rule.<sup>69</sup> Litigants would have no automatic right to question the scope or reach of these norms; litigation would have no obvious and direct effect in pressing the rules in one direction or another.

Reckoning these strategic costs is a core function of the Court's work. It is a poor opinion that loses sight of how it will actually affect legal practice, and that criticism is not mitigated by the goodness of the result sought. It also is a poor opinion that acts to create those costs when other institutions could be expected to solve the problem themselves without imposing such costs upon the judiciary.

The point is not that the Court should never intervene when others might act for it. It is instead that the Court needs to weigh the need for intervention against the costs of intervention to the judicial institution as a whole. Whenever the Court acts to impose a new constraint or new requirement, it must ask both whether the legal materials justify this constraint (fidelity to meaning), and whether the judicial institution can effectively impose it (fidelity to role). The latter question must also ask whether other institutions could not or would not better address the problem the Court has identified. Instead of considering these alternatives, the *Caperton* Court, with its increasingly familiar rhetorical drama, leapt into the midst of this serious problem, keen to be seen to save the day.

This is not an uncommon reaction among lawyers. Too many are too eager to see courts as the exclusive remedy for any social harm, failing to reckon the harm from these judicial remedies, in particular to other critical institutions of democracy. Professor Mark Tushnet has written persuasively about the harm to the democratic branches flowing from an overly protective Court.<sup>70</sup> *Caperton* may prove illustrative of the harm the Court can inadvertently impose on extralegal institutions. In both contexts, activism by the Court can weaken the capacity of other institutions to do the work they are better designed to do.

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no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)); *id.* at 2266 (describing West Virginia's similar standards for judicial disqualification).

<sup>69</sup> It is hard to know in advance what prominence the "*Caperton* claim" will come to have within "the vast arsenal of lawyerly gambits." *Id.* at 2274 (Scalia, J., dissenting). But it does seem that *Caperton* provides a greater opportunity for strategic accusations than the institutions already in place. As noted earlier, a complaint alleging judicial misconduct becomes a matter for other judges to investigate. This process occurs outside the adversarial system and outside the proceedings of any particular case.

<sup>70</sup> See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).



It was not necessary to craft this new rule of constitutional jurisprudence to assure that the problem of Justice Benjamin's bad behavior would be solved — even if the rule was consistent with the very best in our constitutional tradition. The Court instead should have accounted better the costs to itself from this badly defined rule, and the costs to necessary and effective norm-supporting institutions from its overly aggressive intervention into a field that these other institutions could, and would, manage just as well.